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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, herein called the Union, prays that a writ of certiorari issue to review the decrees of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 9, 1960, and May 23, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 273 F. 2d 981 (*infra*, pp. 1a-11a). The decisions and orders of the National Labor Relations Board are reported at 122 NLRB 52 (R. 76-94, 40-59) and at 127 NLRB No. 11 (*infra*, pp. 14a-17a).

JURISDICTION

The decrees of the Court of Appeals were entered on March 9, 1960 (*infra*, p. 12a) and on May 23, 1960 (*infra*, p. 19a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether picketing at a common situs jointly occupied by a primary employer and a neutral employer, conducted in such a manner as to make it clear that the dispute is with the primary employer only, is a secondary boycott prohibited by Section 8(b)(4)(A) and (B) of the National Labor Relations Act if employees of the neutral employer observe the picket line.

2. Whether, in a proceeding to review the partial dismissal of a complaint by the National Labor Relations Board in which the reviewing court rejects the Board's ground for dismissal, the reviewing court may itself adjudicate additional questions which the Board expressly refrained from passing on and direct the Board "to enter an appropriate injunction," instead of remanding to the Board for its initial determination of the reserved questions.

3. Whether, in a proceeding to review the partial dismissal of a complaint by the National Labor Relations Board, the reviewing court may deny intervention to the person against whom the complaint was issued and, without that person's participation as a party, find that the person has engaged in illegal activity and direct the Board "to enter an appropriate injunction" against the person.

STATUTE INVOLVED

Section 8(b)(4)(A) and (B) of the National Labor Relations Act, as amended in 1947 (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), makes it "an unfair labor practice for a labor organization or its agents":

> to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. . . .

Section 8(b)(4)(A) and (B) has not been amended in any respect material to the questions presented by this petition by Section 704(a), Title VII, Labor-Management Reporting and Disclosure Act of 1959 (P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519).

STATEMENT

I. THE FACTS

A. Background

Superior Derrick Corporation owns and operates two floating derricks in the port of New Orleans (R. 79; J.A. 3). It also provides a labor force for River and Gulf Transfer Company at Wood Park, Louisiana,

about 30 miles down the Mississippi River from New Orleans, where the latter company is engaged in loading and unloading bulk materials for shipment in interstate commerce (R. 79; J.A. 3, 6).

Petitioner Union began organizing Superior's employees early in July 1957 (R. 45; J.A. 7-8). On July 9, at Wood Park, Thomas Gould, a representative of the Union, contacted James Howlett, Superior's superintendent. Gould claimed and offered to prove that the Union represented a majority of Superior's laborers at Wood Park, as well as its derrick crews, and asked for recognition of the Union as bargaining representative (R. 45, 79; J.A. 8-9, 121-122). Howlett informed Gould that he did not have the appropriate authority in such matters, but that he would refer the request to one Maught, who had such authority (R. 79; J.A. 9). Several times between July 9 and July 12, Gould telephoned Howlett about seeing Maught, but no meeting was arranged (R. 79; J.A. 9-11). On July 12, the Union wired Superior, reiterating that its employees had authorized the Union to represent them and requesting a meeting to discuss the terms of an agreement (R. 45-46; J.A. 152).

Superior did not respond to the wire (R. 46). Instead, on July 13, Superior entered into a written contract covering its employees with a labor organization called "Employees Group" (R. 46). On July 15, the Union filed unfair labor practice charges against Superior (R. 43; J.A. 4). On August 22, without the Union's concurrence, an informal settlement agreement was entered into between Superior and the Board's Regional Director (*ibid.*). On September 18, the Union filed additional unfair labor practice charges against Superior (*ibid.*). On January 19, 1960, the Board entered

an order against Superior requiring it to desist from the unfair labor practices found and to take certain affirmative remedial action. *Superior Derrick Corporation*, 126 NLRB No. 27, 45 LRRM 1298.

B. The Strike And Picketing

Meanwhile, the evening of July 12, 1959, after Superior had failed to respond to the request for recognition, all Superior's employees then working went on strike (R. 46; J.A. 122). Picketing took place in conjunction with the strike. The picket signs throughout the course of picketing bore the following legend (R. 46, 79; J.A. 20-21, 85-86):

NO DISPUTE WITH ANY
OTHER EMPLOYER
SUPERIOR DERRICK CORP.
ON STRIKE
FOR BETTER WAGES
HOURS & CONDITIONS
SEAFARERS INT. UNION
AFL-CIO

1. Picketing At The Charbonnet Street Wharf

The evening that the strike began, the Company's derricks were located at the Charbonnet Street Wharf in New Orleans, being used there to load a cargo of steel aboard a ship (R. 46, 79; J.A. 13-14, 109). Longshoremen assisting in loading the vessel were employed by Atlantic and Gulf Stevedores, Inc., and were members of Locals 1418 and 1419 of the International Longshoremen's Association (R. 80). It is agreed that Superior and Atlantic and Gulf, both controlled by the same parent corporation, are allied employers, and that Atlantic and Gulf consequently does not occupy the status of a neutral employer (R. 47, 80, n. 5; J.A. 53).

The Union picketed at the location of the derricks at the Charbonnet Street Wharf from the evening of July 12 until July 15. The longshoremen observed the picket line. Superior moved its derricks from the wharf on July 15, and the picketing thereupon ceased. (R. 46-47, 80; J.A. 13, 83-86.)

2. Picketing at Wood Park

The Union began picketing on July 15 at Wood Park, the location of Superior's labor crew (R. 47; J.A. 110). The local sheriff "ran . . . off" the pickets and his deputy jailed one of them (R. 47; J.A. 123, 135, 112). On August 9, a federal district court issued an injunction to restrain the local authorities from such action (R. 47; J.A. 129, 135). The same day the injunction issued, the local sheriff and district attorney (Leander Perez) told a representative of the Union that if he "wanted to get shot to come on down," and thereafter the deputy sheriff ordered the representative "to get out of his parish" and advised him not to "get brave because you got that injunction" (R. 47; J.A. 135, 150, 129). The Union did not attempt to picket at Wood Park after July 15 (R. 47; 123, 135).

3. Picketing at Gretna Wharf

Early on the morning of September 22, the Company began derrick operations at the Gretna Wharf property of the Southern Pacific Railroad (R. 48; J.A. 17-18). Its operations there consisted of unloading, by boom, a cargo of bauxite from a vessel to railroad gondolas on the wharf (R. 48; J.A. 18-19). The two derricks were made fast to the wharf and the vessel was tied up offshore the derricks (R. 48; J.A. 17-18).

About 8 or 9 a.m., a Union representative, Martin Gould, came to the wharf and began picketing at the

extreme edge of the dock, near the ladder which gave the only access to the derricks (R. 48; J.A. 19, 135-136). At about 10 a.m., members of a Southern Pacific train crew, who were to move the loaded gondolas from the wharf and replace them with empties, approached Martin Gould and Herman Troxclair, another Union representative, and asked them what the picketing was about (R. 48; J.A. 142-143, 154-155). The members of the train crew were referred to the picket sign as self-explanatory, and were specifically told that "the picket line was not directed at the railroad" (R. 48-49; J.A. 143, 154-155). As explained by Union representative Martin Gould (R. 48-49; J.A. 143):

> One of the men asked me if I was picketing the wharf. I told him no. I wasn't picketing the wharf. I was picketing Superior Derrick Corporation.
>
> * * *
>
> And that is all. The picket line was directed solely toward them and no other employer.

About an hour later the two pickets were ordered off the wharf by Southern Pacific officials. The nearest point that the Union was thereafter permitted to picket was at the junction of a public road and Southern Pacific's private road which adjoined tracks leading up to and onto the wharf. This point was about 1,600 feet from the derricks. (R. 49; J.A. 28-30.)

Superior's superintendent, James Howlett, went to the train crew and asked them to remove the loaded cars and bring empties. The crew complied with this request about noon, when they hauled away the loaded cars on one track, but brought no empties. (R. 49; J.A. 25-26.)

Picketing continued at the public road throughout the next day, September 23 (R. 50; J.A. 139). About 10 a.m., railroad officials informed Union representative Martin Gould that a train would be brought in, and fifteen minutes later one appeared, stopping short of the picket line (J.A. 146). The railroad officials brought the engineer and train crew to the picket line, and the following conversation ensued (J.A. 147):

> [A railroad official] asked me [Union representative Martin Gould] if this picket line was against the railroad and I told him no, it was solely directed towards Superior Derrick Corporation. He told the engineer, "You see, it is not against you at all. Now, go on and make the shift."
>
> The engineer told him, "No, I am not going in there. My constitution gives me the right not to cross another union's picket line." They talked along these lines a few minutes amongst themselves and then the officials took the train in.

Unloading the vessel with the use of derricks was carried on and completed, the train cars being moved by railroad white collar workers (R. 50; J.A. 34, 37-39).

The derricks remained at the wharf until removed on September 24 (R. 50; J.A. 42-43). With the removal of the derricks from the wharf picketing at the public road ceased (R. 50; J.A. 139).

4. Picketing at the Dumaine Street Wharf

On October 9, one of Superior's derricks was moved to the Dumaine Street Wharf in New Orleans, where Superior had contracted with Texla Stevedoring, Inc., to unload steel plates from a barge and load them aboard a ship (R. 50-51, 80; J.A. 45-46). To accomplish this, the ship was moored against the wharf, with the derrick on the river side of the ship, and the barge

next to the derrick (R. 80; J.A. 47). Texla employed some 75 to 100 longshoremen, represented by Locals 1418 and 1419 of the International Longshoremen's Association, to perform the longshore work on the ships (R. 51, 80; J.A. 46, 71-72). During the morning of October 9, the Union did not picket the derrick operations and the work of the employees of Superior and Texla proceeded without interruption (R. 51, 80; J.A. 47).

The lunch hour for the longshoremen was between 12 noon and 1 p.m., at which time most of them went on the dock to eat (R. 51, 80; J.A. 47-48). Shortly before the end of the lunch hour, Union representative Thomas Gould appeared at the wharf and placed pickets at the vessel's gangway which led to the ship and the derrick (R. 51, 80; J.A. 124-125). This was the closest point where picketing against Superior and appeals to its employees could be made, since the gangway was the only means of access to the derrick and Superior's employees had to use the gangway to board or leave the derrick (R. 80; J.A. 78).

During the lunch hour, after the picket line was established, some of the longshoremen asked Union representative Gould what the picketing was about. Gould did not reply. (R. 80-81; J.A. 130-131.) Still during the lunch hour, E. C. Cook, Texla's superintendent in charge of the longshoremen working the ship, approached Union representative Gould, and the following conversation took place (R. 51; J.A. 127, see also J.A. 74, 80):

> [Cook asked], "What is going on here? What are you picketing this ship for?"
>
> I told him, "Read that sign, we are not picketing that ship."

> He said, "That's the derrick," and I said, "Yes, that's right."
>
> * * *
>
> I said, "My beef is with Superior" and he said, . . . "Can I work my hatches," and I told him, "I can't tell you to work them or not to work them. There is my sign right there," and he left.

Cook, Texla's superintendent, admittedly understood from the picket sign that the dispute was only with Superior (J.A. 73-74, 79-80).

At 1 p.m., at the end of the lunch period, the longshoremen employed by Texla observed the picket line and did not resume their work on the ship (R. 51, 81; J.A. 48, 50, 74). Thereupon, Texla superintendent Cook called representatives of the Longshoremen's Local Unions to which the longshoremen belonged (R. 51; J.A. 75). He was informed that "they had delegates on the way out" (J.A. 75), the longshoremen having already called during the lunch hour because "they didn't know whether they should go back to work or not" (J.A. 90).

About 1 or 1:10 p.m., Paul Guillory, an agent for Longshoremen's Local 1419, arrived at the scene (J.A. 94). He told Union representative Gould that, "I am going to have to send these men across this line," explaining that, "we have a contract with these people and we have to fulfill our contract" (R. 51; J.A. 125). Gould replied that, "If you want to cross it you cross it, and if you don't you don't"; "I am not telling you to go to work or not to go to work. It is not my place to say anything to you about your work. That is your business. There is our sign and a legitimate picket line of SIU . . ." (R. 52; J.A. 125-126).

Guillory instructed the longshoremen to return to work (R. 52; J.A. 98). They did so about 2:30 pm., the delay in returning being due to the longshoremen's desire for assurance, which they obtained, that Texla would pay them "with no loss of time" (R. 52; J.A. 98, 50).

Although pickets remained at the gangway, there was no further work stoppage; picketing continued at this location only when the derrick was there, and picketing ceased with the removal of the derrick upon completion of the job (R. 52; J.A. 76-77, 78-79, 128).

5. Other Picketing

Thereafter, the Union picketed Superior's derrick operations at three other jobs in the port (R. 52; J.A. 51-52). There is no claim or evidence that this picketing was unlawful (R. 52).

II. THE BOARD'S DECISION

The General Counsel claimed that, at the Gretna Wharf and the Dumaine Street Wharf, the Union's picketing was secondary in character, in that "an object" of the picketing at Gretna was to induce railroad employees to cease working, and at Dumaine Street to induce longshoremen to cease working (R. 54-55). Rejecting this claim the Trial Examiner found that the picketing was "primary in character," being directed at Superior with whom the Union had its dispute (R. 56-58). He found that, as to the longshoremen at Dumaine Street, the Union's activity did not reveal that "an object of the picketing was to induce secondary employees to cease work" (R. 56). He further found, as to the railroad workers at Gretna, that (R. 58):

> Seafarers' did not begin to picket at Gretna until Superior's derricks, the situs of the primary dispute, appeared and began work. The pickets took up their first position at the extreme end of the dock, as close as physically possible to the derricks, until rocks fell upon them. They remained at a safer distance, but still upon the dock, until railroad inspectors forced them to retire to a public road, a quarter of a mile away. The evidence is clear that by neither word nor deed did the pickets attempt to cause the railroad crews from carrying out their work. The picket signs specifically revealed that the dispute was only with Superior; it is undisputed that when the railroad crews queried pickets they were told, in unequivocal terms that the dispute was only with Superior. The picketing ceased promptly upon the withdrawal of Superior's derricks.

The case was transferred to a three-member panel of the Board. The Board concluded, one member dissenting, that as "railroad employees are not employees within the meaning of the Act," the Union at Gretna "did not induce 'employees' to engage in" secondary activity (R. 77-78). It therefore found it "unnecessary to resolve" the question whether the picketing at Gretna was primary or secondary (R. 78).

The Board further concluded, another member dissenting and reversing the examiner, that the Union's picketing at the Dumaine Street Wharf was secondary (R. 78-84). The reversal of the examiner was based on the single circumstance that, when the longshoremen asked the Union representative what the picketing was about, the representative did not reply (R. 81-82, *supra*, p. 9). The Board was of the view that, as the longshoremen at the Charbonnet Street Wharf had three months before observed the Union's picket

line (*supra*, p. 6), the Union's representative "could reasonably anticipate that the longshoremen [at the Dumaine Street Wharf] would not cross the picket line, regardless of the legend on the picket signs," and that it was therefore "incumbent upon" him "to answer the questions of the longshoremen so as to make it clear to them that the picketing was not directed against them in order to minimize any possible interference with the work of the neutral employer, Texla" (R. 81). The Board, regarded as irrelevant (1) the fact, which it acknowledged to be true (R. 80, n. 5), that inducement of the longshoremen at the Charbonnet Street wharf to observe the picket line at that location was entirely lawful, for their employer was allied with Superior, and (2) the fact that the railroad employees observed the picket line at the Gretna Street Wharf despite an explanation to them that it was directed at Superior only (R. 83).

Based on its findings at the Dumaine Street Wharf, the Board entered an order requiring the Union to desist from secondary activity, and, based on its finding that railroad workers are not employees within the meaning of the statute, the Board entered an order dismissing the complaint insofar as it was predicated on the picketing at the Gretna Wharf (R. 84-86).

III. THE PROCEEDINGS IN THE COURT OF APPEALS

Superior petitioned the Court of Appeals to review the order insofar as it dismissed the complaint based on the determination that railroad workers are not employees whose inducement is prohibited by Section 8(b)(4) (R. 1-5). The Board petitioned the Court of Appeals to enforce the order against the Union (R. 10-12). The Court consolidated the two proceedings. The Union moved to intervene in the proceeding

instituted by Superior (R. 15-22). The Court denied intervention but granted the Union leave to file a brief as amicus curiae (R. 23).

Adhering to its "prior decisions to the contrary," the Court of Appeals reversed the Board's determination that railroad workers are not "employees" within the meaning of Section 8(b)(4) of the statute (*infra*, pp. 3a-4a).[1] In its brief to the Court of Appeals the Board had stated that, should the Court adhere to its view on this question and reject the Board's, a remand would be appropriate in order for the Board to consider whether the activity at the Gretna Wharf was primary or secondary, explaining that (pp. 12-13):

> . . . [S]hould the Court adhere to its prior decisions, this would, of course, nullify the ground on which the Board dismissed the portion of the complaint relating to the Union's activity at Gretna Wharf. But, it does not follow that such activity was violative of the Act's secondary boycott provisions, for the question remains as to whether the inducement of railroad employees was an incident of legitimate primary activity directed at Superior, or whether it exceeded the bounds of such activity. * * * Since a majority of the Board, in view of its position on the railroad employee question, found it unnecessary to reach this further issue (R. 77-78), a remand to the Board for a consideration of that issue would be appropriate were

[1] As the court notes, the 1959 amendments, by changing "employees of any employer" to "any individual employed by any person," have unambiguously placed railroad workers within the class of persons who may not be induced to engage in the activity prohibited by Section 8(b)(4) (*infra*, p. 4a). This petition does not present any question as to whether the Board or the court was correct in the interpretation of Section 8(b)(4) before the amendment as it pertains to the coverage of railroad workers.

the Court to set aside the original basis for the Board's dismissal.

But the Court of Appeals did not follow that course. Acknowledging that the Board had not "determined, even conditionally, whether the action constituted illegal picketing" (*infra*, p. 4a), the Court nevertheless took the view that, "Since the law is, at least in this Court, now so clear . . . , we think this record is compelling that the Board could not have made any finding other than illegality so that it requires that we direct the issuance of an order prohibiting picketing of this kind" (*infra*, pp. 4a-5a). The element which was decisive in the Court's view was that the railroad workers did choose to observe the picket line, and in the light of the demonstrated "effectiveness of the picket line . . . it is of no real consequence that . . . the pickets may have used the words that it was 'directed' against Superior only and not the railroad" (*infra*, p. 5a). Accordingly, the Court remanded to the Board "with directions to enter an appropriate injunction" (*infra*, p. 11a).

The Court of Appeals affirmed the Board's position that the picketing at the Dumaine Street Wharf was secondary, but on broader grounds which nullified the Board's rationale. The court stated that "A picket line is a potent instrument. . . . [I]t has a special message of its own. To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of 'unfairness' on those engaged in activity behind the picket line" (*infra*, p. 10a). Consequently, the court continued, "The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line *is overcome*" (*infra*, p. 10a, emphasis supplied). If it is not overcome, and em-

ployees of neutral employers do observe the picket line, this result suffices to stamp the picketing as secondary.

Upon the remand to the Board, in accordance with the court's "directions to enter an appropriate injunction" based on the picketing at the Gretna Wharf (*infra*, p. 11a), the Board amended its order to prohibit inducement of the employees of the Southern Pacific Railroad Company (*infra*, p. 16a), and thereafter a supplemental decree was entered enforcing the amended order (*infra*, p. 19a).

REASONS FOR GRANTING THE WRIT

1. The fundamental substantive question in this case is determination of the standard which should govern in ascertaining whether picketing at a common situs jointly occupied by a primary employer and a neutral employer is primary or secondary. The view of the court below is admittedly in conflict with the rationale endorsed by other Courts of Appeals.

(a) The inquiry may be put into quick focus. When a union has a dispute with an employer, picketing at the premises exclusively occupied by that employer is primary and protected. When, in furtherance of that primary dispute, the union pickets the premises exclusively occupied by a neutral employer, the picketing is secondary and prohibited. The troubling question arises when the primary employer and the neutral employer occupy the same premises. In such a situation, to accommodate the right of the union to picket the primary employer with the right of the neutral employer to be free of picketing, the Board early held that "picketing of the premises of a secondary employer is primary if it meets the following conditions" (*Moore Dry Dock Co.*, 92 NLRB 547, 549):

(a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer.

This accommodation has been "widely approved" [2] and adopted as "a sound interpretation of the Act" [3] by the Courts of Appeals for the Second,[4] Fourth,[5] Seventh,[6] Eighth,[7] Tenth,[8] and District of Columbia Circuits.[9] If picketing at a common situs meets the formulated criteria, then the picketing is "not unlawful because employees of the secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refuse . . . to do so, for such effects are within the realm of the 'inci-

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[2] *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 905 (C.A. 2), cert. denied, 351 U.S. 962.

[3] *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2).

[4] *Supra* notes 2 and 3.

[5] *Piezonki* v. *National Labor Relations Board*, 219 F. 2d 879, 882-883 (C.A. 4).

[6] *National Labor Relations Board* v. *Teamsters Local Union No. 135*, 212 F. 2d 216, 219 (C.A. 7).

[7] *Local 618, Automotive Employees Union* v. *National Labor Relations Board*, 249 F. 2d 332, 335 (C.A. 8).

[8] *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226, 230-231 (C.A. 10).

[9] *Seafarers International Union* v. *National Labor Relations Board*, 265 F. 2d 585, 589 (C.A.D.C.); *Sales Drivers Local Union 859* v. *National Labor Relations Board*, 229 F. 2d 514 (C.A.D.C.), cert. denied, 351 U.S. 972.

dental'." *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 (C.A. 2). "Section 8(b)(4)(A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another . . ." *Sales Drivers Local Union 859* v. *National Labor Relations Board*, 229 F. 2d 514, 517 (C.A.D.C.), cert. denied, 351 U.S. 972. "Mere incidental effect on the secondary employer is not enough to constitute a secondary boycott." *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226, 230 (C.A. 10). See also, *Seafarers International Union* v. *National Labor Relations Board*, 265 F. 2d 585, 590, 591 (C.A.D.C.). The heart of the accommodation is that picketing at a common situs which meets the prescribed criteria does not become secondary simply because, despite its circumscription, it nevertheless does not succeed in neutralizing observance of the picket line by employees of a secondary employer.

The court below disagrees. It recognizes "a difference in the approach of this Court and some other circuits . . ." (*infra*, p. 7a).[10] It identifies the difference. "It is not, as some courts sometimes seem to have intimated, a question of whether the *effect* is direct or inci-

[10] Contrast the statement of the court below that, "If *any* object of the picketing is to subject the secondary employer to forbidden pressure then the picketing is illegal. * * * It need not be the sole or even main purpose" (*infra*, pp. 8a-9a), *with* the statement of the Court of Appeals for the First Circuit that "A word such as 'direct' or 'immediate' should perhaps be inserted before the word 'object' in view of the protection afforded to primary disputes under Section 13 of the Act." *National Labor Relations Board* v. *Bangor Building Trades Council*, 46 LRRM 2004, 2005, n. 1 (April 18, 1960).

dental" (*infra*, p. 9a). "It is not, as the *Moore Dry-dock* doctrine phrased it, merely a question of negativing the existence of a dispute with the secondary employer" (*infra*, p. 10a). The court below states explicitly that "we find ourselves unable to accept the rationale of *Seafarers' International Union etc.* v. *N.L.R.B.* (*Salt Dome Production*), D.C. Cir., 1959, 265 F. 2d 585 . . ." (*infra*, p. 9a). The fundamental disagreement between the court below and the Court of Appeals for the District of Columbia Circuit is illustrated by a quotation from each of the opinions. The court below states that (*infra*, p. 10a):

> But if [on the part of the picketing union] there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take *concerted* action so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity.

The Court of Appeals for the District of Columbia Circuit takes a different view (265 F. 2d 585, 592):

> But hope and objective cannot be equated. Unions, like many other organizations, may hope for many things without making those things objects of their programs. Men have many hopes which are not objectives of action. If the statutory clauses here involved were to be interpreted as forbidding any strike in which a labor organization hoped that another employer would cease doing business with the primary employer, almost all strikes would be outlawed; we would suppose that almost all strikers hope other employees will support them, with the natural results of such support.

The essence of the contrary position taken by the court below is that, at a common situs, "The activity,

including the picket line, must be conducted in such a way that the normal appeal of a picket line *is overcome*" (*infra*, p. 10a, emphasis supplied). If it is not "overcome," and employees of neutral employers do observe the picket line, then the picketing is secondary regardless of the union's efforts to cabin its influence. And so, in the court's view, the picketing at the Gretna Wharf was secondary simply because the railroad employees observed the picket line, and the picketing at the Dumaine Street Wharf was secondary simply because the longshoremen observed the picket line. It makes no difference that at the Gretna Wharf, as the trial examiner found, "The evidence is clear that by neither word nor deed did the pickets attempt to cause the railroad crews from carrying out their work. The picket signs specifically revealed that the dispute was only with Superior; it is undisputed that when the railroad crews queried pickets they were told in unequivocal terms that the dispute was only with Superior" (R. 58). For, as the court below states, once "the effectiveness of the picket line" is demonstrated, "it is of no real consequence that . . . the picket may have used the words that it was 'directed' against Superior only and not the railroad" (*infra*, p. 5a). Similarly, it makes no difference that at the Dumaine Street Wharf the longshoremen observed the picket line only for the very short period that they were awaiting word from their own representative as to the course they should take, that they crossed the picket line upon instructions from their representative, that it was obvious that nothing that could be done by the picketing Union would dissuade the longshoremen from observing the picket line until their own representative was heard from, and that the picketing Union did not request the longshoremen's representative to honor the line

(*supra*, pp. 10-11). All that is truly relevant in the view of the court below is that the longshoremen did observe the line.

This total insulation of the neutral employer is at war with "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692. To stamp picketing at a common situs as secondary whenever its consequence is observance of the picket line by a neutral's employees is effectively to negate the congressional objective of "preserving the right of labor organizations to bring pressure to bear on offending employers in primary disputes. . . ." It makes the legality of picketing and the responsibility of the union dependent, not upon the union's own adherence to objective standards of conduct, but upon the subjective reactions of employees of others whom the union does not control. Even if the union requests the employees to cross the line, the picketing is secondary if the employees choose to disregard the request. Under the view of the court below picketing at a common situs is illegal, and the union undertakes it at its peril, unless the union is able to guarantee a negative response upon the part of employees who approach the line.

Yet, as the Court of Appeals for the District of Columbia Circuit stated, "The cases recognize the very practical fact that, intended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers International*

Union v. *National Labor Relations Board*, 265 F. 2d 585, 590. And, as the Second Circuit stated, to hold that the consequence of such action at a common situs is that "the union may not there picket in any way, because the secondary employer might thereby be injured, would be virtually to deprive the union of a powerful weapon which Congress meant to preserve." *National Labor Relations Board* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 67-68. Consequently, to prevent negation of picketing at a common situs, if such picketing meets the formulated criteria, then the picketing is "not unlawful because employees of secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refuse . . . to do so, for such effects are within the realm of the 'incidental'." *Id.* at 68.

The conflict between the court below and other Courts of Appeals upon this important and recurring question should be settled by this Court. Resolution is required not only to guide the Board and the Courts of Appeals in adjudication, but, at least as importantly, to enable the parties to labor disputes to know how to conduct picketing at a common situs. This is especially vital in the maritime world, for a vessel is almost always docked at another person's wharf, and employees of others are constantly about it.

(b) The Board on the merits limited its decision to finding that the picketing at the Dumaine Street Wharf was secondary (*supra*, p. 12). The Board's approach, while verbally more circumspect than the court's, is in essence as destructive of picketing at a common situs. To stamp the picketing as secondary, the Board isolates the single circumstance that, when asked by some longshoremen what the picketing was about, the

Union representative did not reply (*supra*, pp. 12-13). In no other respect was the Union's activity found to be remiss in the least degree. It accorded precisely with the formulated criteria for picketing at a common situs.

The Board's isolation of and reliance upon this single factor is adjudicatory flyspecking. As the dissenting member stated, "Throughout the course of its dispute with Superior, the . . . [Union's] pickets carried signs which declared 'No Dispute With Any Other Employer —Employees of Superior Derrick Corp. on Strike. . . .' I cannot conceive of any language which could convey to Texla's employees with greater clarity that the dispute was with Superior and was not directed against them" (R. 88-89). Oral confirmation would add nothing. The particular longshoremen at this location, unlike the particular longshoremen who crossed the picket line at the Gretna Wharf (J.A. 113-114), sought the advice of their own representative "whether they should go back to work or not" (J.A. 90), and words would not dissuade them from awaiting his instructions before crossing the line (*supra*, pp. 9-11). Furthermore, to refrain from picket line conversation is a necessary precaution in order to minimize the real risk that sinister significance will be drawn from accidental language. To draw equally sinister significance from silence is to make it virtually impossible to safely carry on picketing at a common situs by scrupulous observance of objective standards of conduct. When an unanswered question becomes the difference between legal and illegal picketing, trivia governs the right to picket at a common situs.

2. The Board has never itself decided the merits of the question whether the picketing at the Gretna

Wharf was primary or secondary. In its first decision, a majority of the Board held that railroad workers were not employees within the meaning of the Act whose inducement was disallowed by Section 8(b)(4); that majority expressly stated that it was, therefore "unnecessary to resolve" the question whether the picketing at Gretna was primary or secondary (R. 77-78). The court below reversed. It not only rejected the Board's basis of decision as erroneous in law, but it decided for itself that the picketing at the Gretna Wharf was secondary, and it remanded to the Board "with directions to enter an appropriate injunction" (*infra*, p. 11a). Under compulsion of that remand the Board amended its order to prohibit inducement of the employees of the Southern Pacific Railroad Company (*infra*, p. 16a).

Bypassing the Board upon the merits of the question was egregiously heedless of the "orderly administration of the Act and due regard for the respective functions of the Board and reviewing courts. . . ." *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453, 464. Remand to the Board for its initial determination did not entail a circuitous and futile formality. The trial examiner had found that the picketing was primary (*supra*, pp. 11-12). In the Board's first decision, the dissenting member stated that he would find that the picketing was secondary, citing *Salt Dome Production Company*, 119 NLRB 1638 (R. 78, n. 3). The latter decision was set aside by the Court of Appeals for the District of Columbia Circuit. *Seafarers International Union* v. *National Labor Relations Board*, 265 F. 2d 585. In the Board's supplemental decision, one member of the Board expressed his "respectful disagreement" with the court's view that the

picketing was secondary (*infra*, p. 15a, n. 3). Thus, of the three Board officials with an adjudicatory responsibility who expressed a view on the merits, two thought the picketing was primary and one secondary.

The circumstances commanded a remand to the Board for its initial determination of the merits. "[W]here the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order"; the "issue is one normally to be determined by the Board in the first instance, it being the function of the Board rather than the courts initially to correlate the policies of the Act with conflicting interests." *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U.S. 416, 428. The "guiding principle, violated here, is that the function of the reviewing courts ends when an error of law is laid bare. At that point the matter once more goes to the . . . [agency] for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. Remand is essential to preserve the fact-finding (*Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474) and balancing (*National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96) functions of the Board.

The court below compounded its error by directing the Board "to enter an appropriate injunction," thus withdrawing from the Board the power to decide that the circumstances did not warrant any remedy, as the Board not infrequently determines. *E.g.*, *United Hatters Union*, 121 NLRB 1154. Inquiry into whether any relief is appropriate is an ordinary attribute of the exercise of remedial power (*United States* v. *W. T. Grant Company*, 345 U.S. 629, 633), and to negate it invades the administrative province of initially ascer-

taining the relief warranted, if any. *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608.

3. The court below found that the picketing at the Gretna Wharf was secondary, and directed the Board "to enter an appropriate injunction" based on it, in a proceeding instituted by Superior against the Board to review that part of the Board's order dismissing the complaint insofar as it alleged inducement of railroad workers (R. 1-5). This review proceeding was consolidated with the enforcement proceeding instituted by the Board against the Union to enforce that part of the order directing the Union to desist from secondary activity (R. 10-14). The Union moved to intervene in the review proceeding (R. 15-22), but the court below denied intervention (R. 23).[11] Thus, in a proceeding in which the Union was denied intervention, the court below decided that the Union was engaged in illegal activity and directed the issuance of an injunction against it.

The Union had an absolute right to intervene. Nothing could make this plainer than the fact that the court directed the issuance of an injunction against it. *Cf.*, *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 530. The Board would have no power to find that a person has engaged in an unfair labor practice and to enter an order against it if the person were not a party to the proceeding. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 233. A court has no greater power. It is fundamental that "no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court."

[11] The Union was granted leave to file a brief as amicus curiae (R. 23), which it did.

Mallow v. *Hinde*, 12 Wheat. 193, 198. Since the Union was not a party to the review proceeding, but was indeed denied intervention in it, the court was without power to adjudicate the Union's conduct and the court's direction to enter an injunction against the Union was a nullity.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17512

SUPERIOR DERRICK CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 17619

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, *Respondent*.

Petition to Review, Set Aside, and for Enforcement of an Order of the National Labor Relations Board

(January 21, 1960)

Before TUTTLE, BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: We have again the problem of § 8(b)(4)(A) and (B) Board orders concerning secondary picketing at a so-called common situs. 29 U.S.C.A. § 158(b)(4)(A) and (B). Two separate review-enforcement cases, now consolidated here, grow out of a single Board proceeding and order. The Board, as a matter of law, declined to enjoin picketing of a railroad as the secondary employer, but forbade picketing by the Union[1] of

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[1] The Union is the Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO.

a stevedoring company as the secondary employer.[2] Superior Derrick Corporation, the primary employer, as the charging party, dissatisfied with the former, seeks to set aside that order. The Board, as to the latter, files the conventional petition of enforcement.[3] We agree with each petitioner.

Superior, the primary employer, owns and operates two floating derricks in the Port of New Orleans. In July 1957 the SIU commenced its still unsuccessful effort to organize Superior's employees. The picketing involved here was a part of the SIU's efforts to secure recognition for collective bargaining. That Superior's resistance has resulted in unfair labor practice charges and proceedings against it, or may eventually result in coercive Board orders, does not affect the problem of secondary picketing.[3] For the existence of a dispute between a union and the primary employer is implicit in § 8(b)(4)(A) and (B). Its purpose, stated broadly, is to prevent coercive economic pressures against neutral secondary employers being thrown into the scales in the resolution of the dispute between union and primary employer. No matter how legally unfair the primary employer's conduct may be the union may not use the weapon, either in retaliation or defense, of a proscribed 8(b)(4)(A) and (B) picket line.

Charbonnet Street Wharf Picketing

The first picketing, although not itself the basis for a charge and complaint, was at the Charbonnet Street Wharf.

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[2] The Board proceedings under §10(c), 29 U.S.C.A. §160(c), are reported 122 NLRB 6. Pending final decision in the Board proceedings, the activity involved here was enjoined by the District Court in New Orleans under §10(l). LeBus v. Seafarers' International Union, E.D. La., 1958, 157 F.Supp. 510.

[3] The briefs indicate that §8(a)(1), (2) and (3) unfair labor practice charges have been heard by a Trial Examiner and are pending before the Board.

There the stevedoring company engaged in discharging the vessel was the Atlantic & Gulf Stevedores, Inc., an affiliate of Superior. Consequently, as a company allied with Superior, it did not have the protected status of a secondary employer. However, the longshoremen employed by the stevedoring company were members of ILA Locals 1418 and 1419, the very locals involved in the later Dumaine Street Wharf incident. When the SIU picket appeared, the longshoremen refused to work. The Board found, and we agree, that in considering subsequent episodes, this established both the effectiveness of the picket line and the practical ineffectiveness of the picket sign which bore this legend.

No Dispute With Any Other Employer

Employees of Superior Derrick Corp., on Strike for Better Wages, Hours & Conditions, Seafarers Int. Union, AFL-CIO.

Gretna Street Wharf—Railroad Picketing

We need not at this point discuss these facts as the Board merely held as a matter of law that picketing of railroad employees at Gretna Street Wharf was not within the protection of 8(b)(4)(A) and (B). In so doing the Board was, of course, conscious of our prior decisions to the contrary.[2]

As it has in the past, the Board urgently renews the request that we reconsider and then overrule these decisions. In any case it felt, with deference, that administra-

[1] Two members so voted; a third considered that both on the law and the facts the picketing was illegal and should have been enjoined.

[2] W. T. Smith Lumber Co. v. NLRB, 5 Cir., 1957, 246 F.2d 129; International Rice Milling Co. v. NLRB, 5 Cir., 1949, 183 F.2d 21, reversed in part on other grounds, 341 U.S. 665, 95 L.Ed. 1277, 71 S.Ct. 961, on remand, 95 NLRB 1420 (1951).

tive considerations compelled it to assert its contrary views until the Supreme Court could and would declare a uniform rule applicable in all circuits. The hopes in that direction must have considerably dimmed. For subsequent to the submission of this case, the 9th Circuit has rejected the Board's plea that it create a certiorari-provoking conflict by declining to follow our decisions, note 5, *supra*. *Great Northern Ry. Co. v. NLRB* [16443, Nov. 23, 1959], 9 Cir., 1959, F.2d . And at this late date, there seems little likelihood that this important question will ever reach the Supreme Court. For as the 9th Circuit points out, see notes 11 and 1, F.2d , , all doubt now has been completely removed by the 1959 Amendments. 73 Stat. 519, 1959 U.S. Cong. Code & Admin. News, No. 14, page 2984.

We adhere to our prior position and consequently the Board order may not stand. Neither the Board nor its Examiner determined, even conditionally, whether the action constituted illegal picketing. We cannot refrain from stating that it is unfortunate that the conditional findings, as in the 9th Circuit case, were not made. The very uncertainties which the Board emphasizes as a justification, if not a necessity, for its continuing to adhere to its contrary views notwithstanding the likelihood that the case would come before the 5th Circuit where it would be reversed, argues convincingly that as far as reasonably practicable the administrative fact and legal inference-finding process should be completed. To talk in 1960 of an injunction against an event occurring in 1957 which will never be quite repeated demonstrates, we think, the need for procedures which will obviate further delay and, as here, the further consideration of a factual setting now grown stale by time and robbed of its legal uniqueness by an intervening act of Congress.

Since the law is, at least in this Court, now so clear and unions and their counsel are so well aware of it, we think

this record is compelling that the Board could not have made any finding other than illegality so that it requires that we direct the issuance of an order forbidding picketing of this kind. For the reasons we elaborate in discussing the Dumaine Street Wharf incident, the SIU failed to make it clear that it was not an object of SIU to cause concerted action by the railroad crews to cease handling goods worked on by Superior with the view of thereby subjecting Superior to illegal pressures. When the engine crew coming in to take out loaded cars first encountered the picket line, inquiry was made by them of the pickets. The SIU leader's response was a repeated assertion that the picketing was legal. To a similar inquiry made by the railroad crewmen, another picket merely "informed them to read our signs and further told them that the signs were self-explanatory." Likewise, the pickets were noncommittal in either asking the railroad crew to cross, or not to cross, the picket line. After this initial and successful stoppage the circumstances of which would compel a Board finding of illegality—and which demonstrated again the effectiveness of the picket line and the ineffectiveness of the equivocal disclaimers of illegal objective—it is of no real consequence that, either in a later incident after the pickets had had to withdraw from the railroad property onto a public street a quarter of a mile away, or earlier the pickets may have used the words that it was "directed" against Superior only and not the railroad.

Dumaine Street Wharf Picketing

The Board held that picketing which occurred at Dumaine Street Wharf subsequent to the Gretna and Charbonnet Street Wharf episodes was illegal. We agree.

One of Superior's derrick barges was moved to the Dumaine Street Wharf for use by Superior in performance of its contract with Texla Stevedoring, Inc., an entirely independent concern, to remove steel plates from a barge and load them onto a ship. The ship was alongside the

dock with the derrick barge moored between the offshore side of the ship and the cargo barge. The ship's gangway was the only means by which longshoremen could board the vessel and by which employees of Superior could go from shore onto the derrick barge.

Approximately 75 longshoremen, members of the same ILA Locals 1418 and 1419, were working aboard the ship without incident during the morning. While the longshoremen were knocked off for lunch, the SIU agent took his station near the foot of the gangway carrying the picket sign which thus far had invariably stopped work by secondary employees. Again it worked. For the longshoremen would not reboard the ship to resume work after lunch so long as the gangway was picketed.

What occurred in the interim, the Board considered to be crucial. Some time after the picket was posted but before expiration of the lunch hour, the Board found "some of the longshoremen asked [the picket] what the picketing was all about. [The picket] admittedly did not reply to their questions." In the light of the earlier Charbonnet Street incident, the Board concluded that the picket, a responsible Union officer and apparently the leader in the organization campaign, could reasonably have anticipated that the "longshoremen would not cross the picket line, regardless of the legend on the picket sign." This, the Board reasoned, imposed on the SIU the duty to answer the question "so as to make it clear that the picketing was not directed against them" and to thus "minimize any possible interference with the work of the neutral employer, Texla."

The SIU apparently thinks that all that need be done to avoid the impact of § 8(b)(4)(A) and (B) is to compose a suitable sign and thereafter maintain a discreet silence or at least a noncommittal attitude if words are spoken. But the subsequent cases from this Court reveal that its reliance on *NLRB* v. *General Drivers, Local 968 (Otis Mas-*

seq case), 5 Cir., 1955; 225 F.2d 205, for such a view is plainly misplaced. In *NLRB v. Truck Drivers, Local* 728 (*National Trucking Co.*), 5 Cir., 1956, 228 F.2d 791, the picket sign purported to limit the dispute to the primary employer. Additionally, the union representative had stated that the picketing was "not to be intimated in any way against the [secondary employer] Ford." But when the secondary employer's representative asked the Union agent whether the purpose was not in fact to let the employees of the secondary employer (Ford) know of the dispute, the agent made no response but simply "smiled." 228 F.2d at 793. We held that such "facts speak more eloquently than the spoken words, and [the Union agent's] significant silence * * * cannot be characterized as a clear disclosure." 228 F.2d at 796. In *NLRB* v. *Local* 926 (*Columbus Construction Co.*), 5 Cir., 1959, 267 F.2d 418, 419 at note 2, the signs were changed to make specific reference to "See our leaflet," but we held this undecisive. In *NLRB* v. *Dallas General Drivers, Local* 745 (*Associated Grocery*), 5 Cir., 1959, 264 F.2d 642, the picket signs were ostensibly directed to the public and urged the public not to buy goods distributed by the primary employer to the picketed retail stores. Nonetheless, we affirmed a Board injunction and recognized that the "normal purpose of a picket line is to persuade employees not to cross it." 264 F.2d 642, 648. The importance of these and similar cases of ours has been pointed out in *Retail, Wholesale & Dept. Store Union* v. *Rains*, 5 Cir., 1959, 266 F.2d 503, 505-506; *Local* 450 v. *Elliott*, 5 Cir., 1958, 256 F.2d 630, in which the possibility of a difference in the approach of this Court and some other circuits was recognized.

Similar results have been reached in other circuits. In *Truck Drivers & Helpers, Local* 728 v. *NLRB* (*Campbell Coal*), D.C. Cir., 1959, 249 F.2d 512, cert. denied 355 U.S. 958, 2 L.Ed.2d 533, 78 S.Ct. 543, the signs referred expressly to the dispute with the primary employer only, but illegal picketing was declared from the failure of the

picketing union to assure secondary employees when they walked off the job that the picket line was not directed at them. *General Truck Drivers, Local 270 (Diaz Drayage) v. NLRB*, D.C. Cir., 1959, 252 F.2d 619, cert. denied 356 U.S. 931, 2 L.Ed.2d 762, 78 S.Ct. 775, affirmed a finding of illegal picketing because signs alone are insufficient since the secondary employees and their bargaining union would, without more, consider the picket line aimed at them as well. *NLRB v. Laundry, Linen Supply & Dry Cleaning Drivers; Local 928 (Southern Service)*, 9 Cir., 1959, 262 F.2d 617, affirmed a Board injunction where by standing instructions, the pickets declined to elaborate on the signs or answer inquiries from members of the public or other tradesmen.

Of course this offers no automatic guide for union picketing at a common situs. By its nature, however, the purpose or intent of the picketing is not something which may be evaluated mechanically. And this is so whether it be by a sign, or a sign legend directing attention to a pamphlet, or a desire to obviate the uncertainties inherent in a recollection of what was orally said in response to oral inquiry. See, e.g., *NLRB v. Ferguson*, 5 Cir., 1959, 257 F.2d 88. Congress has forbidden the use of a picket against a secondary employer to induce or encourage secondary employees to strike or refuse to perform services where an object is to force or require that the secondary employer cease doing business with the primary employer. That is a declaration of a positive policy[*] which history records reflected great public dissatisfaction with the hapless predicament of the secondary employer caught in the middle. If *any* object of the picketing is to subject the secondary employer to forbidden pressure then the picketing is illegal. *NLRB v.*

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[*] NLRB v. Denver Bldg. & Constr. T. Council, 1951, 341 U.S. 675, 686, 95 L.Ed. 1284, 1294, 71 S.Ct. 943, . . . ; International B. of Electrical Workers, 1951, 341 U.S. 694, 705, 95 L.Ed. 1299, 1308, 71 S.Ct. 954, . . .

Truck Drivers & Helpers, Local 728, (National Trucking Co.), 5 Cir., 1956, 228 F.2d 791, 795; *NLRB v. Dallas General Drivers, Local 745 (Associated Grocers)*, 5 Cir., 1959, 264 F.2d 642, 647-648. It need not be the sole or even main purpose.

It is not, as some courts sometimes seem to have intimated, a question of whether the *effect* is direct or incidental. Congress did not declare its prohibition in terms of *effect*. It legislated in terms of motive and purpose on the part of the active primary union setting up the picket line. Because of this, we find ourselves unable to accept the rationale of *Seafarers International Union v. NLRB (Salt Dome Production)*, D.C. Cir., 1959, 265 F.2d 585, so strongly urged here by the same SIU. There that court equated the problem with the pressures to which the secondary employer would be subjected had the picketing taken place at the principal site of the primary employer's business rather than at the common situs presented in a *Moore Dry dock* situation. If the effect would be no greater or different in its influence on secondary employers contemplating doing business with the primary employer at his regular business site, the picket line would not, the court reasoned, violate sec. 8(b)(4)(A) and (B). But this is to disregard the plain language and purpose of 8(b)(4)(A) and (B). And, for that matter, this makes superfluous the oft cited element of the *Moore Dry dock* formula that the union make clear that its controversy is with the primary employer only. For if illegality is to be measured by the comparable effect which the picket line would have, a primary union might have and could even express it in categorical terms a purpose and intent to cause the secondary employer to cease doing business with the primary employer and yet that conduct would still be legal. The problems of a common situs or the efforts of the Board

[1] 92 NLRB 547

and courts to accommodate the prohibition of the Act to them cannot permit such an outright disregard of Congressional language.

A picket line is a potent instrument. It may, of course, be the means of obtaining wide publicity for the grievances, actual or supposed, of a union either representing or seeking to represent workers. Members of the public and employees of other employers are a legitimate object of that publicity. But in the context of the long and sometimes bitter history of the trades union movement, it has a special message of its own. To a loyal unionist it is both a spontaneous plea not to engage in any business activity with those behind the picket curtain and an instantaneous branding of "unfairness" on those engaged in activity behind the picket line.

The primary union may hope that from the publicity other unionists may reach the decision that they as individuals do not wish to work under such circumstances. To this extent the Act affords no insulation against the pressures which might be generated on the primary employer. But if there is an expectation or a hope or a desire that employees of the secondary employer will be induced or encouraged to take *concerted* action so that the secondary employer will cease doing business with the primary employer, then the Act bars that activity. Cf. *NLRB* v. *International Rice Milling Co.*, 1951, 341 U.S. 665, 95 L.Ed. 1277, 71 S.Ct. 961. It is not, as the *Moore Dry dock* doctrine phrased it, merely a question of negativing the existence of a *dispute* with the secondary employer. The activity, including the picket line, must be conducted in such a way that the normal appeal of a picket line is overcome. It must be done so that all secondary employees will know that the primary union does not seek what the law forbids—pressure on the primary employer through pressure from the secondary employer because of concerted pressure of

secondary employees on that secondary employer. *NLRB* v. *Laundry, etc. Drivers, Local* 928, 9 Cir., 1958, 262 F.2d 617, and *Retail Fruit & Vegetable Clerks' Union* v. *NLRB*, 9 Cir., 1957, 249 F.2d 591, 599. The law forbids such pressure whether the means be crude or sophisticated. The prohibition is continuous from the outset to the end. *Local 74 [Carpenters]* v. *NLRB*, 1951, 341 U.S. 707, 714, 95 L.Ed. 1309, 1316, 71 S.Ct. 966. . . . Neither signs nor papers nor pamphlets nor silence automatically insulate the activity.

The Board's order for the injunction has ample basis and is to be enforced. The Board's order denying the injunction as to the railroad picketing is reversed and the matter remanded to the Board for further consistent proceedings and with directions to enter an appropriate injunction.

Enforced in part and reversed and remanded in part.

APPENDIX B

(Original Filed—March 9, 1960)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17512

SUPERIOR DERRICK CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 17619

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, *Respondent*.

Decree Enforcing in Part and Reversing and Remanding in Part An Order of the National Labor Relations Board

Before: Tuttle, Brown and Wisdom, Circuit Judges.

By the Court:

This cause came on to be heard upon the petition of Superior Derrick Corporation (No. 17512) to review and set aside that portion of the Board's order of November 12, 1958, dismissing the allegations of the complaint pertaining to the railroad picketing, and upon the petition of the Board (No. 17619) to enforce the remaining portion of the order directed against Respondent, Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, its officers, representatives, agents, successors and assigns. This Court, on November 25, 1959, heard argument of respective counsel and on January 21, 1960, being fully

advised in the premises, handed down its decision. The Court enforced the portion of the Board's order directed against Respondent Union; reversed that part of the Board's order dismissing the complaint as to the railroad picketing; and remanded the latter matter to the Board for further consistent proceedings and with directions to enter an appropriate remedial order. In conformity with the foregoing:

It Is Ordered, Adjudged and Decreed that the portion of the Board's order of November 12, 1958, directed against Respondent Union be enforced.

It Is Further Ordered, Adjudged and Decreed that the portion of the Board's order of November 12, 1958, dismissing the allegations of the complaint relating to the inducement of employees of the Southern Pacific Railroad at the Gretna Wharf is hereby set aside and remanded to the Board for the entry of an appropriate order in conformity with this Court's opinion.

Entered March 9, 1960.

A true copy. Test: Edward W. Wadsworth
Clerk, U. S. Court of Appeals, Fifth Circuit

By Clara R. James, Deputy
New Orleans, Louisiana

APPENDIX C

127 NLRB No. 11 D-1367
New Orleans, La.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 15-CC-71

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO

and

SUPERIOR DERRICK CORPORATION

Supplemental Decision and Order

On November 12, 1958, the Board issued its Decision and Order[1] herein, finding that the Respondent had violated Section 8(b)(4)(A) and (B) of the Act. With respect to certain other unfair labor practices alleged in the complaint, the Board dismissed. On January 21, 1960, the United States Court of Appeals for the Fifth Circuit affirmed the Board's finding of a violation but reversed that part of the Board's Decision and Order dismissing certain allegations of the complaint and remanded the case to the Board for action consistent with the Court's opinion.[2]

In its original decision, a majority of the Board participating therein, found that the Respondent's picketing at the Dumaine Street wharf violated Section 8(b)(4)(A) and (B) of the Act. However, with respect to Respondent's picketing at the Gretna Street wharf, a majority of the Board found that, as the employees of Southern Pacific Railroad Company were the only secondary employees who were allegedly induced to cease work, and as such railroad

[1] 122 NLRB 52.

[2] *Superior Derrick Corporation* v. *N.L.R.B.*, C.A. 5, January 21, 1960 (45 LRRM 2506).

employees were not "employees" within the meaning of the Act, the Respondent did not violate Section 8(b)(4)(A) and (B) of the Act with respect to that incident. The Court found, however, that the railroad employees came within the purview of Section 8(b)(4)(A) and (B) and that, by the conduct of its pickets at the Gretna Street wharf, the Respondent induced such employees not to perform services for their employer under such circumstances as to constitute a violation of Section 8(b)(4)(A) and (B) of the Act.

In conformance with the decision of the United States Court of Appeals for the Fifth Circuit, the Board now finds that the Respondent's picketing at and near the Gretna Street wharf induced and encouraged the employees of the Southern Pacific Railroad Company to engage in a concerted refusal to perform any services with an object of forcing their employer to cease doing business with Superior Derrick Corporation, and with an object of forcing Superior Derrick to recognize the Respondent as the rep

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With respect to the question of whether railroad employees are "employees" within the meaning of the Act, prior to its amendment by the Labor Management Reporting and Disclosure Act of 1959, Chairman Leedom, and Member Fanning, with due deference to the opinion of the Court of Appeals herein, adhere to their views as expressed in *Lumber & Sawmill Workers Local Union No. 2409 (Great Northern RR Co.)*, 126 NLRB No. 12, ftn. 3. Moreover, Member Fanning, in respectful disagreement with the Court, would not find that Respondent's conduct at the Gretna Wharf constituted unlawful inducement within the meaning of Section 8 (b) (4) (A) and (B) of the Act for the reasons set forth in his separate dissenting and concurring opinion in the original decision in this case. Members Rodgers and Jenkins, for reasons indicated in their respective dissents in *Paper Makers Importing Co., Inc.*, 116 NLRB 267, and *American Coal Shipping, Inc.*, 124 NLRB No. 145, are in agreement with the view of the Court herein. Member Jenkins did not participate in the original decision in this case and joins herein solely to reiterate his views as expressed in his dissenting opinion in the *American Coal Shipping* case.

resentative of its employees, although the Respondent was not the representative certified by the Board under Section 9 of the Act, thereby violating Section 8(b)(4)(A) and (B) of the Act.

AMENDED ORDER

IT IS HEREBY ordered that the Board's original Order herein be amended to read as follows:

Upon the entire record in this case and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, its officers, representatives, agents, successors, and assigns shall:

1. Cease and desist from engaging in, or inducing or encouraging the employees of Texla Stevedoring, Inc., and the Southern Pacific Railroad Company or any other employer, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease doing business with Superior Derrick Corporation or to force or require Superior Derrick Corporation to recognize or bargain with the Respondent as the representative of its employees, unless the Respondent has been certified as the representative of such employees under the provisions of Section 9 of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of Act:

(a) Post at its offices and meeting halls in New Orleans, Louisiana, copies of the Notice attached hereto as an Ap-

pendix.' Copies of said notice, to be furnished by the Regional Director for the Fifteenth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by the said Respondent immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material;

(b) Furnish to the Regional Director for the Fifteenth Region signed copies of the Notice attached hereto as an Appendix for posting at the premises of Superior Derrick Corporation, Texla Stevedoring, Inc., and the Southern Pacific Railroad Company, in places where notices to their employees are customarily posted, if they are willing to do so;

(c) Notify the Regional Director for the Fifteenth Region, in writing, within ten (10) days from the date of this Order, as to what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 13, 1960.

BOYD LEEDOM, Chairman
PHILIP RAY RODGERS, Member
JOSEPH ALTON JENKINS, Member
JOHN H. FANNING, Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

'In the event this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER".

APPENDIX

NOTICE

To All Members of Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, and to All Employees of Texla Stevedoring, Inc., Southern Pacific Railroad Company, and Superior Derrick Corporation

PURSUANT TO A SUPPLEMENTAL DECISION AND ORDER of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that

WE WILL NOT engage in, or induce or encourage the employees of Texla Stevedoring, Inc., or of Southern Pacific Railroad Company, or any other employer, to engage in a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require any employer or other person to cease doing business with SUPERIOR DERRICK CORPORATION or to force or require SUPERIOR DERRICK CORPORATION to recognize or bargain with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, as the collective bargaining representative of any of Superior's employees, unless we are certified as such representative under the provisions of Section 9 of the Act.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO
(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

APPENDIX D

Supplemental Decree Filed and Entered: May 23, 1960.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17512

SUPERIOR DERRICK CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 17619

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, *Respondent*.

Supplemental Decree

Before Tuttle, Brown and Wisdom, Circuit Judges.
By The Court:

THIS CAUSE came on to be heard upon a petition of Superior Derrick Corporation to review and set aside, in part, an order of the National Labor Relations Board (hereinafter called the Board), dated November 12, 1958, and directed against Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, (hereinafter called Re-

spondent Seafarers') its officers, representatives, agents, successors and assigns, the Board's answer to said petition, and the Board's petition for enforcement of said order directed against Respondent Seafarers', its officers, representatives, agents, successors and assigns. The causes were consolidated and the Court heard argument of respective counsel on November 25, 1959, and has considered the briefs and transcript of record filed in this cause. On January 12, 1960, the Court, being fully advised in the premises, handed down its opinion enforcing in part, dismissing in part and remanding the case to the Board for action consistent with the Court's opinion. Thereafter, on April 13, 1960, the Board issued a supplemental Decision and amended Order directed against Respondent Seafarers', its officers, representatives, agents, successors and assigns, and has herewith petitioned this Court for entry of a supplemental Decree enforcing said amended order. In consideration whereof, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Fifth Circuit, that the said amended order of the National Labor Relations Board dated April 13, 1960, be, and the same is hereby enforced; and that Seafarers' International Union of North America, Atlantic and Gulf District, Harbor and Inland Waterways Division, AFL-CIO, its officers, representatives, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Entered: May 23, 1960.

ILE COPY

Office-Supreme Court, U.S.
FILED
JUL 5 1960
JAMES R. BROWNING, Clerk

No. 125

In the Supreme Court of the United States

OCTOBER TERM, 1960

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MORTON J. COHEN,
Assistant General Counsel,
ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 125

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL–CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 1a–11a) is reported at 273 F. 2d 891. The Board's decisions and orders are reported at 122 NLRB 52 (R. 76–94) and at 127 NLRB No. 11 (Pet. 14a–17a).[1]

[1] "R" references are to portions of the Transcript of Record printed pursuant to the rules of the court below as Volume I. "J.A." references are to portions of the testimony and exhibits printed as a joint appendix to the briefs of the respective parties below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The judgment of the court below (Appendix, p. 14, *infra*) was entered on January 21, 1960. The decree of the court was entered on March 9, 1960, and a supplemental decree was entered on May 23, 1960 (Pet. 12a–13a, 19a–20a). The petition for a writ of certiorari was filed on June 3, 1960.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The principal question is whether substantial evidence supports the Board's conclusion that the Union's picketing at wharves, at which both employees of the primary employer and those of neutral employers were working, was aimed at the latter, in violation of Section 8(b)(4) (A) and (B) of the National Labor Relations Act.

Subsidiary questions involve (1) whether the petition for certiorari was timely with respect to the judgment entered on January 21, 1960; (2) whether the court below encroached on the primary jurisdiction of the Board in ordering it to enter an injunction rather than remanding for further findings of fact; and (3) whether the petitioner was prejudiced by the refusal of the court below to permit it to intervene.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at p. 3 of the petition.

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[2] For reason given below, p. 8, *infra*, the petition appears to be untimely with respect to one part of the case.

STATEMENT

A. The Board's findings

On July 9, 1957, petitioner Union, claiming that it represented a majority of Superior's employees, requested to be recognized as bargaining representative (R. 45, 79; J.A. 8–9, 121–122). When Superior did not immediately grant recognition, the Company's employees went on strike and began picketing at the Charbonnet Street Wharf in New Orleans (R. 79; J.A. 13–14, 109). Two floating derricks owned by the Company were then being used at that location to load a cargo of steel aboard a ship (R. 79; J.A. 13, 109). Because of the picketing, members of Locals 1418 and 1419 of the International Longshoremen's Association, employed to assist in the loading, refused to work on the ship and the Company was unable to complete the job (R. 80; J.A. 13, 83–86, 91–93).[3] The picket signs used at the Charbonnet Street Wharf and during all subsequent picketing incidents referred to below, bore the following legend (R. 79; J.A. 19–22, 153):

NO DISPUTE WITH ANY
OTHER EMPLOYER
EMPLOYEES OF
SUPERIOR DERRICK CORP.
ON STRIKE
FOR BETTER WAGES
HOURS & CONDITIONS
SEAFARERS INT. UNION
AFL–CIO

[3] Since these longshoremen were employed by a stevedoring firm that was affiliated with Superior, the foregoing incident

On September 22, Superior was conducting derrick operations at Gretna Wharf, property of the Southern Pacific Railroad (R. 48; J.A. 17–18). The job consisted of unloading, by boom, a cargo of bauxite from a vessel to railroad gondolas on the wharf (R. 48; J.A. 18–19). Union pickets appeared on the wharf, and shortly thereafter they were approached by members of a Southern Pacific train crew who asked them what the picketing was about (R. 48; J.A. 135–136, 142–143, 154–155). The Union representatives told the railroad employees that the picketing was legal and "informed them to read our signs and further told them that the signs were self-explanatory" (J.A. 142–143, 154–155). The train crewmen thereafter refused to move the railroad cars, and Superior was able to complete its work at the Gretna Wharf only after railroad white collar workers moved the cars (R. 49–50; J.A. 25–27, 32, 34, 37–39).

On October 9, one of Superior's derricks was engaged at the Dumaine Street Wharf in New Orleans in transferring steel plates from a barge and loading them aboard a ship (R. 80; J.A. 45–46). Some 75 to 100 longshoremen represented by Locals 1418 and 1419 of the International Longshoremen's Association were employed by Texla Stevedoring, Inc., to perform the longshore work on the ship (R. 80; J.A. 46, 71–72). The work of the employees of Superior and Texla proceeded without interruption until the Union's pickets appeared and stationed themselves

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was not alleged to have been a violation of Section 8(b)(4) of the Act (R. 80; J.A. 2, 52–53). It does, however, shed light on other picketing incidents hereafter described.

at the gangway leading to the ship and to the derrick (R. 80; J.A. 47, 124–125). The stevedores refused to cross the picket line, and asked picket leader Thomas Gould what the picketing was about (R. 80–81; J.A. 130–131). Gould at first refused to answer their questions and remained silent (R. 80–81; J.A. 130–131). He was then approached by Paul Guillory, an agent for Local 1419, who told Gould that his men were working under contract for Texla and would have to continue working (R. 51; J.A. 89–94). Gould replied that he was not telling Guillory either way—to work or not to work—and that he had nothing to do with the Longshoremen's Union. Gould referred to the picket sign saying, "There is the picket sign. It is a legitimate SIU picketing sign" (R. 51–52; J.A. 125, 126). The longshoremen did not return to work for an hour and a half, when they were finally instructed to do so by Guillory (R. 52; J.A. 50, 98).

B. The Board's conclusions and order

The Board found no violation of Section 8(b)(4) with respect to the Gretna Wharf picketing, on the ground that the only employees at that location allegedly induced by the Union to cease work were railroad employees, and railroad employees were not "employees" within the meaning of that Section (R. 77–78).[4] However, with respect to the picketing at the Dumaine Street Wharf, the Board concluded that the Union violated Section 8(b)(4) (A) and (B) of

[4] The 1959 amendments to the Act have since clearly placed railroad workers within the class of persons who may not be induced to engage in the activity prohibited by Section 8(b)(4). 73 Stat. 519, 542, 29 U.S.C., Supp. I, 158(b)(4).

the Act. Applying the evidentiary criteria formulated in *Moore Dry Dock Co.*, 92 NLRB 547, 549, for ascertaining whether picketing at a common situs has a primary or an illegal secondary object, the Board found that the Union had failed to observe the requirement that the picketing disclose clearly that the dispute is with the primary employer. In the Board's view, Union representative Gould could have anticipated, from the experience at Charbonnet, that the longshoremen would be likely to regard the picketing, irrespective of the legend on the signs, as aimed at them. In these circumstances, the Union's failure to answer clearly and without evasion inquiries of the longshoremen concerning the purpose of the picketing evidenced an intention to extend the picketing beyond Superior to neutral, secondary employers (R. 81–82).

The Board's order dismissed the complaint as to the Gretna picketing. As to the Dumaine picketing, it required the Union to cease and desist from inducing or encouraging the employees of Texla Stevedoring, Inc., or any other employer, to engage in a concerted refusal to perform services with an object of forcing a cessation of business relations with Superior, or forcing Superior to recognize or bargain with the Union unless it has been certified under Section 9 of the Act. Finally, the order required the Union to post appropriate notices (R. 84–86, 93–94).

C. The Court of Appeals proceedings

Superior, the charging party before the Board, petitioned the court below to review that part of the Board's order dismissing the complaint as to the

Gretna or railroad picketing. The Board also petitioned the court to enforce the portion of its order directed against the Union. The two cases were consolidated for purposes of argument, and the Union, although denied leave to intervene in the review case, was permitted to submit a brief therein as *amicus curiae* and to argue orally (Pet. 26).

The court upheld, as adequately supported by the record, the Board's conclusion that the Union's picketing at the Dumaine Street Wharf was for objects prohibited by Section 8(b)(4) (A) and (B) of the Act. The court agreed that, in the light of the earlier Charbonnet Street incident where the same longshore locals had observed the Union's picket line, picket leader Gould's failure to answer clearly and without evasion the inquiries of the longshoremen concerning the purpose of the picketing justified the inference that the Union had an illegal secondary object (Pet. 6a–8a).

With respect to the Gretna Wharf picketing, the court, adhering to the view expressed in two earlier decisions,[5] found, contrary to the Board, that railroad employees were covered by Section 8(b)(4) of the Act. Noting that it was clear from the record that the Union's object at Gretna was the same as that at Dumaine, the court went on to find, without first submitting this issue to the Board, that the Gretna picketing was also violative of Section 8(b)(4) (A) and (B) (Pet. 4a–5a).

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[5] *International Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21 (C.A. 5), reversed in part on another ground, 341 U.S. 665; *W. T. Smith Lumber Co.* v. *National Labor Relations Board*, 246 F. 2d 129 (C.A. 5).

The court therefore enforced the remedial portions of the Board's order, and reversed the dismissal portion, remanding that part of the case to the Board with directions to enter an appropriate supplemental order (Pet. 11a). A judgment to this effect was entered on January 21, 1960 (p. 14, *infra*), the same day as the court's opinion.

The Board thereafter presented to the court a decree implementing its judgment and decision, which was entered on March 9, 1960 (Pet. 12a–13a). Furthermore, it accepted the remand on the Gretna picketing and, on April 13, 1960, entered an amended order banning such picketing (Pet. 14a–17a). This order was enforced by a supplemental decree entered by the court on May 23, 1960 (Pet. 19a–20a).

ARGUMENT

1. The judgment of the Court of Appeals enforcing the Board's order with respect to the picketing at the Dumaine Wharf was entered on January 21, 1960. The petition for certiorari, however, was not filed until June 3, 1960, more than 90 days after the entry of the judgment. Although a decree was entered after the judgment, it did not change any matter of substance or resolve any genuine ambiguity in the judgment, insofar as the Dumaine Wharf picketing was concerned. Nor did the remand to the Board for a supplemental order covering the Gretna Wharf picketing affect the finality of the judgment respecting the Dumaine Wharf picketing. Accordingly, it would appear that, under *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, the peti-

tion, to the extent that it seeks review of the Board order remedying the Dumaine Wharf picketing, is untimely.

2. Insofar as the substantive question which petitioner seeks to raise is also presented by the Gretna Wharf picketing, it does not warrant review by this Court. The fundamental issue is whether the Union's picketing at a site where both employees of the primary employer and those of a neutral secondary employer were at work was confined, as nearly as practicable, to the primary employer, or whether it was aimed at the secondary employer and his employees. If the former, the picketing is legitimate primary activity; if the latter, it is for an object proscribed by Section 8(b)(4)(A).[6] The court below, after examining the circumstances surrounding the Union's picketing of Superior's operations on the New Orleans waterfront, concluded that there was sufficient basis to warrant the conclusion that the Union's object was a secondary one (Pet. 5a–6a). Stripped of its trappings, petitioner's position is that the record does not support such conclusion. The resolution of this factual question adversely to petitioner does not present an issue appropriate for certiorari.

In any event, the record adequately supports the conclusion reached. As noted above, the Union was well aware, from its experience at the Charbonnet

[6] The 1959 amendments to the Act do not have any bearing on this aspect of the case.

Wharf, that other unionized employees would be likely to regard the picketing as a strike signal to them, notwithstanding the fact that the signs indicated that the dispute was only with Superior. Accordingly, when the picketing was extended to other wharves, it was reasonable to expect that the Union, if it were sincere in its ostensible desire to confine the picketing to Superior, would give a forthright answer to secondary employees concerning the purpose of the picketing, should inquiry be made. When, instead, Union agents gave evasive replies, the inference was warranted that the Union was in fact aiming its picketing at the secondary employer and his employees.

The conclusion that the legend on the picket sign may be negated by equivocal action accompanying the picketing, far from constituting "adjudicatory flyspecking" (Pet. 23), accords with settled authority, as the court below noted (Pet. 7a–8a). See *National Labor Relations Board* v. *General Drivers, Local 968*, 225 F. 2d 205, 207–208 (C.A. 5); *Truck Drivers Local 728* v. *National Labor Relations Board*, 249 F. 2d 512, 514 (C.A.D.C.), certiorari denied, 355 U.S. 958; *General Truck Drivers Local 270* v. *National Labor Relations Board*, 252 F. 2d 619 (C.A.D.C.), certiorari denied, 356 U.S. 931, enforcing 117 NLRB 885, 886; *National Labor Relations Board* v. *Laundry Drivers Local No. 928*, 262 F. 2d 617, 620 (C.A. 9). Nor is a conflict of decisions justifying review by this Court presented by petitioner's effort to show (Pet. 18–22) that there is language in the opinion of the court below which appears to indicate an approach different

from that of the Court of Appeals for the District of Columbia Circuit in *Seafarers International Union* v. *National Labor Relations Board* (*Salt Dome*), 265 F. 2d 585. The facts of the *Salt Dome* case are clearly distinguishable from the situation here, there being no conduct by the union which would in any way negate the primary object stated on the picket signs. Indeed, in situations more analogous to the instant case—i.e., *Truck Drivers, Local 728, supra,* and *General Truck Drivers, Local 270, supra*—the District of Columbia Circuit has reached the same conclusion as the court here. See also, *Local 761, International Union of Electrical Workers* v. *National Labor Relations Board,* 45 LRRM 3190, 3192–3193 (C.A.D.C.), April 18, 1960, explaining the limited scope of the earlier *Salt Dome* decision.

3. Nor is an issue warranting certiorari presented by petitioner's contention (Pet. 23–26) that the court should not have made a finding on the objective of the Gretna picketing but should have referred the matter to the Board for initial decision. Since the court had all of the facts before it, and the situation was essentially similar to the Dumaine picketing, where the court had sustained the Board's finding of a violation, the court considered it proper to decide the question itself without first obtaining the Board's views thereon. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 331 U.S. 416, 428. In any event, the Board acquiesced in the court's decision by accepting the remand and proceeding to issue a supplemental decision and order.

Similarly, no issue warranting review is presented by petitioner's contention (Pet. 26) that it was erroneously deprived of the right to intervene in the proceeding instituted by Superior against the Board to review its dismissal of the portion of the complaint pertaining to the railroad picketing. It does not appear that petitioner was prejudiced by the court's denial of its motion to intervene. It was granted full opportunity to present its views in the review proceeding, through an *amicus curiae* brief and on oral argument. Moreover, after the reversal of the Board on the railroad picketing, the Board issued a supplemental decision and order, which was subsequently enforced in a proceeding brought against the Union (Pet. 19a–20a). That proceeding gives petitioner standing to petition for certiorari with respect to the railroad picketing just as if it had been a party to the proceeding first instituted by Superior.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1960.

APPENDIX

Judgment

Extract from the Minutes of January 21, 1960

No. 17512

SUPERIOR DERRICK CORPORATION

v.

NATIONAL LABOR RELATIONS BOARD

No. 17619

NATIONAL LABOR RELATIONS BOARD

v.

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL–CIO

These causes came on to be heard on the petition of Superior Derrick Corporation for review and to set aside an order of the National Labor Relations Board made on November 12, 1958 in the proceeding known upon the records of the Board as Case No. 15–CC–71; and on petition of the National Labor Relations Board for enforcement of said Order, and was argued by counsel;

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the order of the Board for the injunction in this cause be, and the same is hereby, enforced; and that the Board's order denying the injunction as to the railroad picketing be, and it is hereby, reversed; and the matter is remanded to the Board for further consistent proceedings and with directions to enter an appropriate injunction.

U. S. GOVERNMENT PRINTING OFFICE, 1960

COPY

No. 125

IN THE

Supreme Court of the United States

October Term, 1960

SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD, AND SUPERIOR DERRICK CORPORATION,

Respondents.

REPLY OF PETITIONER TO THE BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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SEAFARER'S INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC AND GULF DISTRICT, HARBOR AND INLAND WATERWAYS DIVISION, AFL-CIO,

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Statement

This brief is submitted by petitioner pursuant to Rule 24(4) of this Court, in reply to the brief of the National Relations Board in opposition to the petition.

Reply

I. Timeliness of the Petition

The Board restricts its claim of untimeliness to the extent that petitioner "seeks review of the Board order remedying the Dunaine Wharf picketing * * *" (Brief

in Opposition, p. 9). No dispute exists as to the timeliness of the petition with respect to the order dealing with the Gretna Wharf picketing. The basis for the Board's claim is the extract from the Court's minutes of January 21, 1960 (Brief in Opposition, p. 14).

The Board's position is invalid, for the following reasons:

a. Rule 38 of the Rules of the United States Court of Appeals for the Fifth Circuit, entitled "Respecting Review of Orders of the National Labor Relations Board", states, in section (5) thereof:

> "(5) PREPARATION OF DECREES ENFORCING ORDERS-SETTLEMENT-ENTRY
>
> When an opinion of this Court is filed directing the entry of a decree enforcing in whole or in part the order of an administrative agency, board, commission, or officer and the Court has not entered the decree, the agency, board, commission, or officer concerned shall within ten days serve upon the respondent and file with the Clerk a proposed decree in conformity with the opinion. If the respondent objects to the proposed decree as not in conformity with the opinion, he shall within five days thereafter serve upon the agency, board, commission, or officer concerned and file with the Clerk a proposed decree which he deems to be in conformity with the opinion. The Court will thereupon settle and enter the decree without further hearing or argument."

Manifestly, because the Board—and, we submit, the Fifth Circuit, as well—did not consider the extract a final disposition, the Board submitted a proposed decree and, on March 9, 1960, the Court's decree was entered (Pet., p. 12a-13a).

b. That decree, it will be noted, makes no express reference to any former judgment. The context of the use therein of the word, "decision", suggests, rather, a reference to the opinion of January 21, 1960, "in conformity with" which the March 9 decree was entered. While mindful of the general rule that nomenclature does not necessarily determine what the Court's end process may be (for the purpose of evaluating the timeliness of a petition to review it), we nonetheless submit that the title of the March 9 document is of significance here, conforming as it does not only to the nomenclature employed in the Fifth Circuit's Rule, but also to the nomenclature of the final disposition referred to in Secs. 10(f) and (h) [Title 29, U. S. C., Secs. 160(f) and (h)] of the National Labor relations Act, as amended.

c. In addition, we may inform the Court that Mr. C. Paul Barker, of New Orleans, trial counsel in this case and "of counsel" in this phase of the proceedings, was informed by Mr. Edward W. Wadsworth, Clerk of the U. S. Court of Appeals, Fifth Circuit, that he considered the date of entry of the decree—not the date of the extract from the minutes—as the date of final disposition, so that it is from that date that the time for filing the petition starts running (cf., Stern and Gressman, Supreme Court Practice (2nd Edition), BNA Incorporated, p. 162).[1]

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[1] A considerable argument could be made, in our judgment, for measuring the time to file a petition from the May 23, 1960 Supplemental Decree (Pet., p. 19a-20a). However, we do not make this argument, since the primary purpose of this phase of the reply is to demonstrate that the January 21, 1960 extract does not render the petition untimely as to the Dumaine Wharf segment of the case.

d. Finally, since the legal question arising from the opinion and decree below is the same with respect to the Dumaine and Gretna picketing, (see Brief in Opposition, p. 11), if certiorari be restricted to the latter portion of the case, ultimate victory by the Union in this Court would result in an anomalous situation. Picketing could then be resumed at the Gretna Wharf, but would be beclouded by an existing injunction at Dumaine, conjecturally not, perhaps, a totally irremediable situation, but one which this Court could so easily obviate, notwithstanding the assumption, arguendo, of the validity of the Board's claim of untimeliness (cf. *United States* v. *Ohio Power Company* (1957) 353 U. S. 98, 1 L. Ed. (2d) 683, 77 Sup. Ct. 652: rehearing denied 353 U. S. 977, 1 L. Ed. (2d) 1139, 77 Sup. Ct. 1053.

II. Importance of the Case and the Conflict Among the Circuits

The Board opposes the petition by way of a usual route, asserting, as it does, that the case involves no more than the resolution of factual questions (see Brief in Opposition, p. 9). The choice of route is not surprising. What is surprising is the Board's opposition in the face of an opinion in self-proclaimed disagreement with the "rationale" of other Circuits, expressly naming the District of Columbia Circuit (Pet. p. 9a) and expressly differing with the leading Board case on common situs picketing, *Moore Dry Dock Co.* (1950) 92 NLRB 547 (Pet., p. 10a), in reliance upon which the picketing in this case was conducted. Most important of all, however, the accommodation of the rights of primary picketers with the rights of neutral employers, laboriously developed by the Board and approved by at

least six Circuits as "a sound interpretation of the Act" (Pet., p. 17), becomes non-existent, if the opinion and decree below are to be upheld. For if, as the Court below would have it, it is the burden of primary picketers at a common situs to so conduct their picketing as to overcome "the normal appeal of a picket line" (Pet., p. 10a), it is clear that that Court, as we stated in the petition, is calling for the total insulation of neutral employers. But, total insulation of a neutral employer is the very antithesis of this accommodation. The two cannot be reconciled, for the very term, "accommodation", inexorably implies the "normal appeal of a picket line" specifically recognized by the Court below (Pet., p. 10a).

It is with respect to this point that the invalidity of the Board's opposition, in classifying the decree below as simply constituting a factual resolution unfavorable to petitioner, is most clearly demonstrated. More significantly, it is with respect to this point that the conflict between the Court below and the other Courts of Appeals cited in the petition becomes so clearly delineated. And, finally, it is this point which demonstrates the overriding importance of the holding below. It is of overriding importance to all of labor but, to maritime labor unions such as petitioner (and other unions similarly situated, such as, for example, those in the building trades), whose picketing activities perforce take place overwhelmingly predominantly at a common situs, it is no exaggeration to say that what is at stake here is the ability of such unions to picket at all.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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